

Appeal from the decision of the Oregon State Office, Bureau of Land Management, rejecting public sale application OR 8579.

Affirmed.

1. Public Sales: Generally -- Public Sales: Applications -- Public Sales: Sales Under Special Statutes -- Withdrawals and Reservations: Generally -- Withdrawals and Reservations: Effect of -- Wild and Scenic Rivers Act

A public sale application, filed pursuant to the Unintentional Trespass Act of September 26, 1968, 43 U.S.C. §§ 1431 - 1435 (1970), and 43 CFR Part 2785 (1971), embracing lands which the records show to be withdrawn by Public Land Order 5490 on February 12, 1975, and withdrawn under the Wild and Scenic Rivers Act on October 2, 1968, is properly rejected.

2. Withdrawals and Reservations: Effect of -- Withdrawals and Reservations: Power Sites

The inclusion of lands belonging to the United States in a proposed power project pursuant to section 24 of the Federal Power Act of 1920, 16 U.S.C. § 818 (1970), has the effect of reserving or withdrawing those lands from entry, location, or other disposal under the public land laws of the United States until otherwise directed by the Federal Power Commission or by Congress and until the withdrawal is revoked by the Secretary of the Interior.

APPEARANCES: T. E. Markham, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

On July 2, 1975, the Oregon State Office, Bureau of Land Management (BLM), rejected T. E. Markham's petition for public sale, which had been filed pursuant to the Unintentional Trespass Act of September 26, 1968, 43 U.S.C. §§ 1431-1435 (1970), and 43 CFR Part 2785 (1971), because the land had been withdrawn from appropriation under that Act by Public Land Order 5490.

In 1966 appellant purchased a strip of land 200 feet wide in section 28, T. 38 S., R. 8 W., W.M., Josephine County, Oregon, and built a house on it. He contends there had never been a "legal survey of the section," and the cost being prohibitive, he relied on boundary evidence available on the property. A survey made in July of 1971 found the northwest corner marker approximately 300 feet to the west of the true corner. As a result, a corner of appellant's house, some fruit trees, a number of grape vines, and a small garden area were found to be on BLM land. Appellant filed a petition for public sale under the Unintentional Trespass Act on September 20, 1971. ^{1/} This application was suspended by the Bureau, pursuant to 43 CFR 2091.2-5, pending final action on the July 17, 1962, proposed withdrawal Oregon 012693 concerning the land in question. This proposed withdrawal culminated in Public Land Order 5490, February 12, 1975, setting the land aside for multiple use purposes.

[1] An application for a withdrawal, filed in compliance with 43 CFR Subpart 2351, has the effect of temporarily segregating such lands:

* * * from settlement, location, sale, selection, entry, lease and other forms of disposal under the public land laws, including the mining and mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal.

43 CFR 2091.2-5(a).

Further, all subsequent applications filed pursuant to the public land laws are to be "suspended until final action on the application for withdrawal or reservation has been taken." *Id.* Appellant's application was filed several years after the filing of proposed withdrawal Oregon 012693 and, therefore, was temporarily suspended

^{1/} The Unintentional Trespass Act of September 26, 1968, had a statutory life of 3 years from the date of its enactment. 43 U.S.C. § 1435 (1970). To utilize the provisions of the Act, an applicant must have filed within that period. Appellant has complied with this provision.

awaiting final action. In 1975, Public Land Order 5490 withdrew, "subject to valid existing rights," 243,000 acres in Oregon, including the 27.90 acres in appellant's petition. Appellant has not acquired a "valid existing right." Filing an application under the Unintentional Trespass Act does not create a right. John C. Mills, 12 IBLA 390 (1973); see J. D. Carter, 3 IBLA 44 (1971).

The lands in the application are also subject to another withdrawal pursuant to the Wild and Scenic Rivers Act of October 2, 1968, 16 U.S.C. § 1271 et seq. (1970). Section 5(a)(9) of that Act, 16 U.S.C. § 1276(a)(9) (1970), designated the entire Illinois River in Oregon for potential addition to the national wild and scenic rivers system. Section 8(b), 16 U.S.C. § 1279(b) (1970), provided that all public lands constituting the bed or bank, or those lands within 1/4 mile of such bank, of any river listed in section 5(a) were withdrawn from entry, sale, or other disposition under the public land laws for a period of time provided in section 7(b)(i) of the act. Cf. Ralph Page, 8 IBLA 435 (1972). Section 7(b)(i), 16 U.S.C. § 1278(b) (1970), originally provided a 5-year period following the enactment of the Act for the Secretary of the Interior and other concerned agencies to conclude that such rivers should not be included in the rivers system. As a precautionary measure, the Department of the Interior and the Department of Agriculture filed proposed withdrawal OR 11304, October 1, 1973, extending the segregation of the lands within 1/4 mile of the Illinois River beyond October 2, 1973, the date the statutory time period elapsed. On May 10, 1974, section 1(b)(3) of P.L. 93-279 amended section 7(b)(i) of the Wild and Scenic Rivers Act, extending the time limitation from 5 to 10 years, i.e., until October 2, 1978. 16 U.S.C.A. § 1278(b) (1974).

This Board generally recognizes that a withdrawal of lands is preclusive, as a matter either of law or policy, of favorable action on an application filed pursuant to the Unintentional Trespass Act. John W. Savage, 16 IBLA 53 (1974). The Unintentional Trespass Act authorizes the Secretary of the Interior, "on his own motion or on application of an owner of contiguous lands, and upon a finding that it is not needed for public purposes, to sell at public auction any tract of public domain * * *." 43 U.S.C. § 1431 (1970) (emphasis added). "Public domain" in this context is land subject to the operation of the public land laws. John W. Savage, supra at 54. "Lands which have been withdrawn from entry under some or all of the public land laws remain so withdrawn until revocation or modification of the withdrawal order * * *." Rowe M. Bolton, 5 IBLA 226, 227 (1972); David W. Harper, et al., 74 I.D. 141, 142 (Syllabus 1967). Therefore, in essence, these are no longer "public domain" lands subject to the Unintentional Trespass Act.

[2] Regardless of the above considerations concerning the effect of the withdrawals aforementioned, the record on appeal reveals another withdrawal covering the 27.90 acres in question, effective May 21, 1930, for Power Project 853. Further, the plat notes a power site application, OR 8579, for the same land.

The filing of an application for power purposes with the Federal Power Commission has the effect of withdrawing the land by operation of law pursuant to section 24 of the Federal Power Act of June 10, 1920, 16 U.S.C. § 818 (1970), instead of temporarily segregating the land until final action. Herman Joseph, 21 IBLA 199 (1975).

Section 24 of the Federal Power Act * * * provides that any lands of the United States included in any proposed project under the Act " * * * [S]hall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress." The reservation of such lands from disposal is tantamount to a withdrawal of the lands from the operation of the public land laws and, until such time as the withdrawal is revoked and there has been a restoration to entry, the land affected by the withdrawal is not subject to appropriation or disposal. Juan N. Menchaca, 14 IBLA 212 (1974); John C. Amonson, 8 IBLA 346 (1972).

State of Alaska, 20 IBLA 341, 342 (1975).

Furthermore:

* * * [e]ven though the land has not been used and may not be used for the purpose for which it was withdrawn, it is the legal effect of a withdrawal that is determinative of the question of availability of land for entry and the actual use to which the land has been put is immaterial. David W. Harper, et al., 74 I.D. 141, 149 (1967). * * *

Rowe M. Bolton, supra at 227.

Unfortunately, because of these withdrawals affecting the land, no relief may be granted to appellant under his application. It was properly rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Joseph W. Goss
Administrative Judge

